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No. 81-2150

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

JIM MCNEFF, INC.,
Petitioner,
v.
FRANK L. TODD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND FOR THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND FOR THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

This brief *amici curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

Jim McNeff, Inc., (hereafter the "petitioner" or "employer") entered into a prehire agreement with the International Union of Operating Engineers, Local No. 12 (hereafter the "union") pursuant to § 8(f) of the National Labor Relations Act, as amended. As part of that agreement, petitioner promised to make fringe benefit contributions to union-employer administered trust funds

established pursuant to § 302(c) of the Labor Management Relations Act. Although work was thereafter performed pursuant to the agreement, petitioner never made any of the fringe benefits contributions. After an audit, trustees of the funds, respondents here, brought suit pursuant to § 3C1 of the LMRA to collect the unpaid contributions. While petitioner signed the agreement, "he claims he has never read it, nor did he ever intend to abide by its terms." (667 F.2d 800, 801.) Petitioner has thus sought, and obtained, the benefit of labor, while dishonoring the obligation he undertook to pay for that labor in part by making contributions to the fringe benefit funds. Indeed, petitioner admittedly treated the § 8(f) agreement he signed as a legal nullity. The question in this case is whether petitioner and other employers in the same position, as well as the unions with whom they have contracted, may so treat § 8(f) agreements.

Petitioner's principal theory is that the § 8(f) agreement here is not judicially enforceable because the union has not established its majority representative status. We show that this defense is inconsistent with the language of § 8(f), which expressly makes such agreements lawful even if the union represents only a minority of the employees. Acceptance of the defense would, moreover, undermine a principal Congressional objective in enacting § 8(f)—to enable employers to know their labor costs before estimating their bids on construction projects. If, as petitioner would have it, a § 8(f) agreement has no binding effect, the agreement, which could be repudiated at any time by either party, would provide no assurance on future costs. And, of course, it would be unconscionable to permit an employer who enters into a § 8(f) agreement to accept labor and then repudiate any part of his obligation to pay for that labor. Additionally, § 301 of the LMRA, which was enacted to make agreements between employers and unions binding on both parties, is irreconcilable with such a defense.

Nor does petitioner's position receive any sustenance from *NLRB v. Iron Workers*, 434 U.S. 335. *Iron Workers* involved the relationship between § 8(f) and the provisions of the NLRA—§§ 8(a)(5), 8(b)(3), 8(b)(7)(C) & 9—that state the methods by which a union may become a majority representative and the bargaining obligation of employers and such representatives. *Iron Workers* approves the view of the NLRB that a prehire agreement is "voidable" until the union has attained majority status. The Court was not, however, called upon to determine by what means an agreement can be voided in the sense of vitiating the mutual obligations of the parties. The correct interpretation of the Act in our view is that a prehire agreement is binding until it has been terminated by the union's loss of the election authorized in the proviso to § 8(f). The alternative view which would allow a party to abrogate the prehire agreement merely by so notifying the other party has no basis in the statutory language, and is contrary to the purposes of both § 8(f) & § 301. Of course, while resolution of this question is of importance in the administration of the Act and to the rights of employers, employees and unions generally, the present case must go against petitioner in any event: For petitioner gave no notice to the union that petitioner was abrogating the contract, but simply failed to make the payments to which petitioner had obligated itself.

Petitioner resists enforcement of the § 8(f) agreement here also on the ground that he entered into the agreement under "duress". But that agreement was entered into under conditions envisioned and privileged by Congress, as is confirmed by this Court's decision in *Woelke & Romero, Inc. v. NLRB*, —— U.S. ——, 50 LW 4538 (May 24, 1982).

ARGUMENT

PETITIONER'S DEFENSES TO THIS ACTION TO SECURE COURT ENFORCEMENT OF A § 8(f) AGREEMENT CONFLICT WITH THE LANGUAGE AND POLICY OF THE NLRA AND LMRA.

A. The language of § 8(f) provides in pertinent part as follows:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members * * * because (1) the majority status of such labor organizations has not been established under the provisions of section 9 of this Act prior to the making of such agreement * * * Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

At its very outset the section thus provides that it "shall not be an unfair labor practice under subsections (a) and (b) of" § 8 to enter into an agreement described in § 8(f). But for this savings provision, an exclusive recognition agreement with a minority union in the construction industry would be "an unfair labor practice under subsections (a) and (b) of" § 8.[1] The execution of such an agreement "is legitimated by § 8(f) when the employer is in the construction industry." *NLRB v. Iron*

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[1] This was the holding of *Garment Workers v. Labor Board*, 366 U.S. 731. Although *Garment Workers* was not decided by this Court until 1961, the enactment of § 8(f) was urged upon Congress by employers and unions in the construction industry because of their concern, prompted by prior Board decisions, that §§ 8(a) & (b) would be so interpreted.

Workers, 434 U.S. 335, 345 (hereafter "*Iron Workers*" or *Higdon*").[2] A judicial order requiring an employer to observe the obligations stated in a § 8(f) agreement is therefore an order requiring observance of an agreement Congress took pains to make lawful.[3]

Moreover, an employer's effort to escape its obligations under a § 8(f) agreement wholly undermines a principal purpose served by prehire agreements in the construction industry, a purpose of which Congress approved and which was a motivating reason for § 8(f)'s enactment:

> One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. [S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959), quoted in *Iron Workers*, 434 U.S. at 348.]

If a § 8(f) agreement is not legally enforceable an employer cannot know in advance of bidding what his labor costs will be. To be sure, if petitioner succeeds in this particular case, the only immediate effect would be that a § 8(f) agreement would put a *ceiling* on the employers' obligations, but neither petitioner nor his supporting *amici curiae* has had the temerity to suggest that § 8(f) allows employer parties to nullify agreements but prohibits union parties from doing so. Thus, in a period of full employment a union could, on petitioners' view that a § 8(f) agreement is not binding, strike, or refuse to refer employees as previously agreed upon unless the em-

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[2] The remainder of the quoted passage from *Iron Workers* in which the Court defined the "limited scope" of § 8(f)'s exception is also material in this case and is quoted at p. 8, *infra*.

[3] We note, in passing, that the particular obligation sought to be enforced here—the making of payments to funds which comply with § 302(c)(5) of the LMRA—is also entirely lawful. Contrast *Kaiser Steel Corp. v. Mullins*, —— U.S. ——, 50 L.W. 4152 (Jan. 13, 1982) which allowed the defense of illegality in an action seeking the payment of fringe benefits.

ployer promised to pay higher wages (or make larger fringe benefit contributions) than previously agreed upon.

Allowance of petitioner's defense in this case likewise is inconsistent with the plain words of § 301, the jurisdictional provision on which this suit was brought.[4] That section, without any limitation even arguably pertinent here, provides federal court jurisdiction over "[s]uits for violations of contracts between an employer and a labor organization * * *." And petitioner's position utterly perverts § 301's objective:

> We feel that the aggrieved party should also have a right of action in the Federal courts. * * * If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. * * * Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce. [S. Rep. No. 105, 80th Cong., 1st Sess. 15-16 (1947) quoted in *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 453.]

As the *Textile Workers* Court stated, § 301 "expresses a federal policy that federal courts should enforce [the] agreements [within its scope] on behalf of or against labor organizations and that industrial peace can be best obtained only in that way" (353 U.S. at 455). Thus, § 301 particularizes the salient point of the law of con-

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[4] An additional basis for jurisdiction over the present case by the trustees is § 502(g) of the Employees' Retirement Income Security Act of 1974, 29 U.S.C. § 1132(g) which has since been amended by § 306 of the Multiemployer Pension Plan Amendments of 1980, 29 U.S.C. § 1145. Petitioner's defense to the action of the respondent trustees is inconsistent with that Act also. We do not address this point, because it is developed in the briefs for respondent and *amicus curiae* National Coordinating Committee for Multiemployer Plans.

tracts generally—that the parties to an agreement are to be held to the promises contained therein through court actions to enforce the agreement. And nothing in the legislative history of § 8(f) signals an intent to create something so extraordinary as an unenforceable agreement. While the 1959 Congress made it plain that "[n]othing in such provision [§ 8(f)] is intended . . . to authorize the use of force, coercion, strikes, or picketing to compel any person to enter into such prehire agreements" (H.R. Rep. No. 1147, 86th Cong., 1st Sess., 42 quoted and discussed in *Iron Workers*, 434 U.S. at 348, n.10) there is not a word suggesting that a § 8(f) agreement, once entered into, is not, like all other "contract[s] between an employer and a labor organization", enforceable in court through § 301. Against this background the rule stated in *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 is very much in point:

> Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms. See *Perrin v. United States*, 444 U.S. 37, 42-43.

B. Petitioner's claim that a § 8(f) agreement has no binding effect rests primarily on a misreading of *NLRB v. Iron Workers*, *supra*. According to petitioner, "This Court in *Higdon* held that minority prehire agreements are unenforceable" (Br. for Pet. p. 22, initial caps omitted). This Court did not so hold.

(1) What the *Iron Workers* Court did hold was that the National Labor Relations Board acted within its powers in determining that a union that is a party to a § 8(f) agreement, and that does represent a majority of the employees, violates § 8(b)(7)(C) by picketing to enforce that agreement (434 U.S. at 341-343, 350, 352). The Court ruled too—since the question was also at the heart of the disagreement between the Board and the Dis-

trict of Columbia Circuit over the meaning of § 8(f) (see *id.* at 341)—that the Board could properly conclude that an employer who is a party to a § 8(f) agreement violates his duty to bargain under § 8(a)(5) by refusing to honor such an agreement *only* if the union represents a majority of the employees (*id.* at 345-346). In reaching these results, the Court reasoned as follows:

After observing that § 8(f) is an exception to the rule making agreements which grant exclusive recognition to a minority union an unfair labor practice (see p. 5, *supra*), the Court continued:

> [This] exception is nevertheless of limited scope, for the usual rule protecting the union from inquiry into its majority status during the terms of a collective bargaining contract does not apply to prehire agreements. A proviso to the section declares that a § 8(f) contract, which would be invalid absent the section, "shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)." The employer and its employees—and the union itself for that matter—may call for a bargaining representative election at any time. [434 U.S. at 345.]

This proviso, as the Court observed, "expos[es] unions with prehire agreements to inquiry into their majority standing by elections under § 9(c) * * *" (*id.*). It was on the basis of the proviso that the Board held, with this Court's approval, that a § 8(f) agreement does not, by itself, grant the union the status of an exclusive bargaining representative—the status required to bring into play the employer duty to bargain stated in § 8(a)(5) (*id.* at 345-346).

In *Iron Workers* itself the Board had extended this reasoning to the § 8(b)(7)(C) context, holding

> that when the union picketed to enforce its prehire agreement, [the employer] could challenge the union's majority standing by filing a § 8(b)(7) charge and could prevail, as Higdon did here, because the

> union admittedly lacked majority credentials at the picketed projects. Absent these qualifications, the collective-bargaining relationship and the union's entitlement to act as the exclusive bargaining agent had never matured. Picketing to enforce the § 8(f) contract was the legal equivalent of picketing to require recognition as the exclusive agent, and § 8(b)(7)(C) was infringed when the union failed to request an election within 30 days. [434 U.S. at 346.]

This Court concluded that the Board's view is not inconsistent with the language or purpose of the statute:

> Because of § 8(f), the making of prehire agreements with minority unions is not an unfair practice as it would be in other industries. But § 8(f) itself does not purport to authorize picketing to enforce prehire agreements where the union has not achieved majority support. Neither does it expand the duty of an employer under § 8(a)(5), which is to bargain with a *majority* representative, to require the employer to bargain with a union with which he has executed a prehire agreeemnt but which has failed to win majority support in the covered unit. [434 U.S. at 346, emphasis in original.]

Moreover, the *Iron Workers* Court declared that the major purpose of § 8(b)(7) is to prevent the use of picketing to interfere with the employees' free choice of an exclusive bargaining representative (*id.* at 346-347) and that "Congressional concern about coerced designations of bargaining agents did not evaporate as the focus turned to the construction industry" and to the enactment of § 8(f) (*id.* at 347-349).

(2) The foregoing holdings that a minority union may not enforce a § 8(f) agreement either by a refusal to bargain charge under § 8(a)(5) or by picketing, do nothing to support petitioner's much broader contention that a minority union may not enforce such an agreement at all, specifically in a suit under § 301, as here.

Petitioner's premise is that a determination that an employer who does not abide by a § 8(f) agreement with a minority union does not commit a § 8(a)(5) unfair labor practice requires the conclusion that the employer has not violated the contract for the purposes of § 301 (see Pet. Br. 43-47). That is a false premise. While the 1947 Congress had originally intended to grant the NLRB a jurisdiction over contract breaches *equal* to that of the courts, that approach was rejected in favor of one that, through §§ 8(a)(5), 8(b)(3) & 8(d), grants the Board a *narrower* jurisdiction in this regard than § 301 grants the courts. As a result, for example, the Court has "[held] that * * * a 'modification' [of a contract provision] is a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining" and that the "remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract * * *". (*Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 185, 188.) As there explained:

> [Section 8(d)] stems from the 1947 revision of the Act, an important theme of which was to stabilize collective-bargaining agreements. The Senate bill, in particular, contained provisions in §§ 8(d) and 301(a) to prohibit unilateral mid-term modifications and terminations and to confer federal jurisdiction over suits for contract violations. See S. 1126, 80th Cong., 1st Sess., §§ 8(d), 301(a). The bill also included provisions to make it an unfair labor practice for an employer or labor organization "to violate the terms of a collective-bargaining agreement." *Id.*, §§ 8(a)(6), 8(b)(5). In conference the Senate's proposed §§ 8(d) and 301(a) were adopted with relatively few changes. See H. R. Conf. Rep. No. 510, *supra*, at 34-35, 65-66. The provisions to make contract violations an unfair labor practice, on the other hand, were rejected with the explanation that "[o]nce parties have made a collective bargaining contract the enforcement of that contract should be

> left to the usual processes of the law and not to the National Labor Relations Board." *Id.*, at 42. The purpose of the proscription of unilateral mid-term modifications and terminations in § 8(d) cannot be, therefore, simply to assure adherence to contract terms. As far as unfair-labor-practice remedies are concerned, that goal was to be achieved through other unfair-labor-practice provisions that were rejected in favor of customary judicial procedures. See *Dowd Box Co. v. Courtney*, 368 U.S. 502, 510-513 (1962). [404 U.S. at 186-187.]

In the present context, the respect in which § 8(a)(5) is narrower than § 301 is apparent on the face of the two provisions. Section 8(a)(5), by reference to § 9(a), is expressly limited to making refusals to bargain with a union that has obtained majority status an unfair labor practice. Section 301 is not so limited; that provision extends to all suits for violation of "contracts between an employer and a labor organization" and not just to such suits based on a contract between an employer and a majority representative. In light of this difference the *Iron Workers'* holding that there is no § 8(a)(5) unfair labor practice in the present circumstance is of no greater moment in this § 301 case than the holding in *Pittsburgh Glass* that there had been no § 8(a)(5) violation would be in a § 301 case based on a breach of a contract provision covering a non-mandatory bargaining subject. For in both these instances, and in contrast to *Howard Johnson v. Hotel Employees*, 417 U.S. 249, on which petitioner relies, the refusal to provide relief is based on Congress' policy of limiting the unfair labor practice provisions so that certain breach-of-contract claims would be the exclusive province of the courts and not on a Congressional policy rendering agreements which the parties have made wholly unenforceable.

Further, "economic coercion" by picketing differs fundamentally from "coercion" by a court order under § 301. Indeed, it is the precise distinction between picketing and litigation on which this Court relied in declaring that

the Board's interpretation of § 8(b)(7) "does not, as respondents [Iron Workers] claim, render § 8(f) meaningless" (434 U.S. at 349). In an accompanying footnote (*id.* at n.11) the Court compared § 8(f) to the construction industry proviso to § 8(e), which permits enforcement of "hot-cargo clauses" by judicial action, but not "by conduct forbidden by § 8(b)(4)" (which includes, but is not limited to, picketing). Petitioner's position, which would exclude both picketing and judicial enforcement, *would* "render § 8(f) meaningless".

Distinguishing §§ 8(a)(5) & 8(b)(7) on the one hand and § 301 on the other is also in harmony with the proviso to § 8(f) whereby the "employer and its employees—and the union itself for that matter—may call for a bargaining representative election at any time" (434 U.S. at 345). Enforcement of a § 8(f) agreement through a refusal to bargain charge or by picketing where the union has not previously been chosen by a majority of the employees would enable the union to achieve the status of an exclusive bargaining representative while circumventing the election provided for in the § 8(f) proviso. But judicial enforcement of such an agreement does not create majority status; rather the court order merely gives effect to the terms of an entirely lawful § 8(f) agreement such as, for example, those stating the obligation to make payments to § 302(c) trust funds, as here, or the obligation to utilize a union hiring hall as expressly provided in § 8(f)(3).[5]

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[5] Pet. Br. 35 points to a case in which the employer had refused to use the union hiring hall. The union was subsequently decertified in an election. According to petitioner "the requirement for using the union hiring hall was obviously not in [the employees] best interests" (*id.*) This supposed detriment to the employees should be prevented, petitioner's argument runs, by refusing enforcement to the agreement. But if the employer in that case had complied with the agreement, he might have obtained a complement of employees who would have voted for rather than against the union; indeed, it is reasonable to surmise that the employer in that

(3) Petitioners criticize the lower courts which have enforced § 8(f) prehire agreements for misunderstanding the nature of collective bargaining agreements (Pet. Br. 22-23). Petitioner's basic notion is that labor contracts are "contracts between an employer and its employees, through the union as the *agent*—the collective bargaining agent—of the employees" (*id.*, emphasis in original). This betrays petitioner's total inattention to the language of § 301(a) which grants jurisdiction to the federal courts over "[s]uits for violation of *contracts between an employer and a labor organization* representing employees in an industry affecting commerce * * *" (emphasis added). Petitioner's assertion also ignores, as we have noted, § 8(f)'s primary purpose; for if unions are not parties to prehire contracts, then unions may, after having signed such agreements, repudiate them with impunity and strike for higher wages. Nor is petitioner's denial of the union's role as a party to the agreement a mere inadvertence; petitioner concludes this portion of its argument by stating that a union that enters into a § 8(f) agreement "is an agent waiting for a principal. Until [the union achieves majority support] the prehire agreement is a document waiting to be adopted by a majority of the employee." (Pet. Br. 23). In other words, until that time, there is, according to petitioner, no binding agreement.[6]

Another version of what is essentially the same idea is petitioner's argument that a § 8(f) agreement is "*only* a preliminary step which envisions further acts before

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the employer in that case breached the § 8(f) agreement which he had signed in order to select a work force hostile to the union. The employer in that case was thus seeking to benefit from his own wrong in breaking his promise.

[6] A further defect in this portion of petitioner's argument is that it distorts the passage in the *Higdon* opinion, 434 U.S. at 350, from which it quotes. This errro, which is repeated at Pet. Br. 29, is discussed at pp. 14-15 *infra*.

it becomes a binding collective bargaining agreement." (Pet. Br. 29, emphasis in original). This argument rests entirely on a distortion of *Ruttman Construction Co.*, 191 NLRB 701, 702, quoted in *Iron Workers*, 434 U.S. at 345, and of *Iron Workers* itself. *Ruttman* (as *Iron Workers* recognizes) addresses only the issue whether noncompliance with a § 8(f) agreement before the union achieves majority status is a refusal to bargain in violation of § 8(a)(5). The pertinent passage in *Ruttman* reads as follows:

> It is clear, however, that in enacting Section 8(f) to assist in resolving such problems, Congress merely permitted parties to enter into such prehire agreements without violating the Act. It does not mean that a failure to abide by such an agreement is automatically a refusal to bargain. In essence, therefore, this prehire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship; such actions may include the execution of a supplemental agreement for certain projects or covering a certain area and the hiring of employees who are usually referred by the union or unions with whom there is a prehire agreement. These subsequent actions with respect to District 50 never transpired and a full bargaining relationship between District 50 and the Respondent never reached fruition as to this project or location. [191 NLRB at 702, footnote omitted, emphasis added.]

The point of overriding importance is what the Board did not say—*viz.*, that a prehire agreement is unenforceable in a breach of contract suit. The Board did not say so because that issue, which is the issue in this case, was not before the Board, having been committed by Congress to the courts. (See pp. 10-11, *supra.*)

Petitioner also quotes as follows from the *Iron Workers* opinion: "When the union successfully seeks majority support, the prehire agreement attains the status of a collective bargaining agreement . . ." (Pet. Br.

29, citing 434 U.S. at 350). The actual sentence in this Court's opinion is as follows:

> It is also undisputed that when the union successfully seeks majority support, the prehire agreement attains the status of a collective-bargaining agreement *executed by the employer with a union representing a majority of the employees in the unit.* [434 U.S. at 349-350, emphasis showing the material elided by petitioner.]

The concluding portion of the sentence, which petitioner omits, makes clear in what sense the prehire agreement is a "preliminary step": It is a preliminary step to a collective bargaining agreement between an employer and a *majority representative.* The Court did not say that it is a "preliminary step" in the sense contended for by petitioner—*viz.*, a step preliminary to a binding agreement as, to give a familiar example, negotiations are a preliminary step to such an agreement.

(4) Perhaps petitioner's dominant theme is that its interpretation is necessary to preserve employee "freedom of choice." It is by no means novel for employers to pose as their employees' protectors (cf. *Adair v. United States*, 208 U.S. 161), but petitioner's argument is especially cynical. Petitioner would vindicate its employees' freedom of choice by denying them a portion of the prescribed compensation for the labor they have already performed.[7] Petitioner's position in fact nullifies employee

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[7] In disputing that enforcement of the agreement would benefit the employees, petitioner cites *Carpenters Pension Fund v. Sorenson*, 108 LRRM 2988 (N.D. Ill.) (Pet. Br. 35). The court there assumed without any basis, that the payment to the pension fund might have eroded wages which the employees would otherwise have received, and implicitly assumed (contrary to the judgment of millions of employees who through their union bargain for payment to pension funds) that the employees would prefer to have the employer make wage payments. The *Carpenters* court also said that "it is for the employees to decide" and that "the union must show that it has majority support." This reasoning simply overrides

freedom of choice also because on its view either the employer or the union could abrogate the agreement at any time, and could do so both prospectively and *retrospectively* without regard to the employees' desires.

The Congressional design of § 8(f), on the other hand, accommodates all the interests involved. As previously discussed, the § 8(f) proviso enables the employer, employees or union to call for a representation election at any time. If the union wins the election, it attains the same status under § 9(a) as if the bargaining relationship had not originated in a prehire agreement. If, however, the union loses the election the prehire agreement is terminated because the privilege created by § 8(f) is then lost. (See 434 U.S. at 345, quoted at p. 8, *supra.*) Thus, § 8(f) enables the employees to invoke the Board's election procedures and either terminate the contract for the future by voting against the union or to make the contract a full fledged collective bargaining agreement by voting in favor of the union.

In short, petitioner's invocation of employee freedom of choice in order to render § 8(f) agreements unenforceable is "inadmissible here, for the reason that that accommodation between these competing factors has already been made by Congress." (*Machinists Local v. Labor Board*, 362 U.S. 411, 428) Justice Harlan's reasoning in *Machinists* is highly relevant:

> [It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The "policy of the Act" is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figures, however weightily, in it. Cf. note 7, ante. It may be asserted, without fear of contradic-

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the Congressional decision in § 8(f) to authorize unions to enter into prehire agreements without majority support.

> tion, that the interest in employee freedom of choice is one of those given large recognition by the Act as amended. But neither can one disregard the interest in "industrial peace which it is the overall purpose of the Act to secure." *Labor Board* v. *Childs Co.*, 195 F.2d 617, 621-622 (concurring opinion of L. Hand, J.). [362 U.S. at 428.]

In enacting § 8(f) the compensating check to safeguard employee free choice which Congress provided is that the affected employees are to be protected by enabling them to call at any time for an election through which they may abrogate the § 8(f) agreement. And *Iron Workers* decided that those employees would be further protected, by virtue of § 8(b)(7)(C), against picketing to compel them to choose the union as their representative. But Congress did not invest employees with the dubious freedom of working under an agreement which the employer and the union could nullify at any time, even where the consequences would be—as petitioner urges here—that the employer could avoid paying in full for their labor.

(5) Petitioner argues finally that judicial enforcement of § 8(f) agreements would be contrary to what this Court *Lion Dry Goods, supra.* In *Lion Dry Goods* the Court read the word "contracts" in § 301 as *not* limited to agreements between employers and exclusive bargaining representatives.[8] Section 8(f) was referred to as an example of a contract between an employer and a union that does not have majority status, and the Court said that "nothing supports the improbable Congressional intent that the federal courts be closed to such contracts." (369 U.S. at 27. See also *id.* at 29.)

In *Iron Workers* the Court responded to the argument that "permitting an employer to repudiate a prehire agreement until the union attains majority support renders the contract for all practical purposes unenforceable

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[8] Justice Frankfurter, no enthusiast for § 301(a), dissented on another point but agreed with the Court's holding in this regard. See 369 U.S. at 30.

[and would be] contrary to" *Lion Dry Goods* (434 U.S. at 351) by stating

> There, the Court's opinion recognized that § 301 of the National Labor Relations Act confers jurisdiction on the federal courts to entertain suits on contracts between an employer and a minority union, as well as those with majority-designated collective bargaining agents. Section 8(f) contracts were noted as being in this category. The Court was nevertheless speaking to an issue of jurisdiction. That a court has jurisdiction to consider a suit on a particular contract does not suggest that the contract is enforceable. It would not be inconsistent with *Lion Dry Goods* for a court to hold that the union's majority standing is subject to litigation in a § 301 suit to enforce a § 8(f) contract, just as it is in a § 8(a)(5) unfair labor practice proceeding and that absent a showing that the union is the majority's chosen instrument, the contract is unenforceable. [434 U.S. at 351-352.]

The foregoing passage states that *Lion Dry Goods* in determining that the federal courts have jurisdiction over suits for violation of a § 8(f) agreement left open the question whether a union's majority status may be raised as a defense in a § 301 suit. But the question thus identified was not decided in *Iron Workers* either. Nor was a decision of the issue implicit in the *Iron Workers* conclusion that the Board was correct in its interpretation of §§ 8(a)(5), 8(b)(7)(C) & 8(f). (See pp. 10-12, *supra*.) The question being open, we submit that the reasoning of *Lion Dry Goods* (369 U.S. at 25-29) is sound and should be followed to the conclusion that the defense that the union did not have majority status should not be entertained in a § 301 suit.[9]

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[9] See also *New Mexico Dist. Council, Etc. v. Mayhew Co.*, 664 F.2d 215, 217-218 (C.A. 10) and cases cited *id.*; *Glaziers & Glassworkers Local Union No. 767 v. Custom Auto Glass Distributors*, —— F.2d —— (C.A. 9 No. 79-4199 October 12, 1982).

C. Petitioner contends also that the § 8(f) agreement here is the product of unlawful duress and should for that reason not be enforced. But all that happened in this instance is that a general contractor bound by a "union signatory subcontracting" clause in its collective bargaining agreement made lawful by § 8(e)'s construction industry proviso, advised that petitioner must as a condition of doing work for the general contractor sign the instant § 8(f) agreement. As the Court noted in *Woelke & Romero, supra*, the petitioners there

> contend[ed] that if the subcontracting clauses at issue here are approved, the unions will have a powerful organizing tool. Subcontractors will not be able to obtain work unless their employees are represented by the union. Thus, they will force their employees to become members of the union. In effect, the subcontracting clauses will create a "top-down" pressure for unionization; they will take the representation decision out of the hands of the employees and place it in the hands of the employers. [50 L.W. at 4543.]

The Court responded:

> It is undoubtedly true that one of the central aims of the 1959 amendments to the Act was to restrict the ability of unions to engage in top-down organizing campaigns. See *Connell Construction Co.*, 421 U.S., at 632 (discussing legislative history). It is also true that secondary subcontracting agreements like those at issue here create top-down organizing pressure. However, even if the agreements were limited in application to jobsites at which both union and nonunion workers were employed, there would be some top-down organizing effect. Such pressure is implicit in the construction industry proviso. The bare assertion that a particular subcontracting agreement encourages top-down organizing pressure does not resolve the issue we confront in this case: how much top-down pressure did Congress intend to tolerate when it decided to exempt construction site projects from § 8(e)? As we have already explained,

> we believe that Congress endorsed subcontracting agreements obtained in the context of a collective-bargaining relationship—and decided to accept whatever top-down pressure such clauses might entail. Congress concluded that the community of interests on the construction jobsite justified the top-down organizational consequences that might attend the protection of legitimate collective-bargaining objectives. [50 L.W. at 4543; footnote omitted].

Sections 8(e) and 8(f) were enacted at the same time as part of the same legislation. Petitioner's suggestion that the effect of making agreements such as that here lawful through § 8(f) is to preclude enforcement of equally lawful § 8(e) agreements is too paradoxical to entertain. Rather, as *Woelke & Romero* shows, the choice to which petitioner was placed here—to sign a § 8(f) agreement or not to work for a general contractor bound by a § 8(e) union signatory subcontracting clause—is one Congress contemplated and approved as consistent with the national labor policy; it is not a choice that Congress conceived to be illegal duress.

CONCLUSION

For the above-stated reasons, the judgment below should be affirmed.

Respectfully submitted,

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